IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1977

No. 77-201

MARK BRIAN PRICE,

Petitioner,

v.

PETER J. PITCHESS, SHERIFF OF LOS ANGELES COUNTY, STATE OF CALIFORNIA,

Respondent,

PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest.

BRIEF OF REAL PARTY IN INTEREST IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I

OPINIONS BELOW

The petition accurately sets forth the opinions below.

II

JURISDICTION

The petition adequately sets forth

the alleged jurisdiction[1] of this Court to entertain the present petition.

III

ISSUES PRESENTED

A. WHETHER THE CONSTITUTION REQUIRES PROMPT INTERSTATE RENDITION OF FUGITIVES

B. WHETHER CONSTITUTIONAL DEFENSES TO THE CHARGE MUST BE ASSERTED IN THE DEMANDING STATE

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1. Although "final" in the sense of "an effective determination of the litigation" (Market St. Ry. Co. v. Railroad Commission [1945] 324 U.S. 548, 551; 89 L.Ed. 1171, 1176; 65 S.Ct. 770, 773) if the California extradition proceeding is taken as "the litigation", the decision of the Ninth Circuit is not "final" in the sense of an effective determination of the Utah criminal proceeding which has not proceeded past the January 26, 1970 complaint.

Should Utah criminal proceedings ever commence (whether by means of extradition or petitioner's fortuitous return to that state) this Court's resolution of petitioner's double jeopardy, collateral estoppel, and speedy trial contention would apparently bind the Utah court's resolution of those issues so as to either conclude the criminal proceedings or permit their continuation.

C. WHETHER APPELLANT'S CONTENTIONS ARE OUTSIDE THE NARROW SCOPE OF EXTRADITION HABEAS CORPUS

D. WHETHER THE PLEA OF DOUBLE JEOPARDY, LIKE ANY PLEA, MUST BE ENTERED IN THE DEMANDING STATE AND CANNOT BE CONSIDERED PRIOR THERETO IN THE ASYLUM STATE AS A DEFENSE TO EXTRADITION

E. WHETHER STATE REMEDIES HAVE BEEN EXHAUSTED

F. WHETHER, ASSUMING APPLICABILITY OF PROSPECTIVE DOUBLE JEOPARDY IN THE DEMANDING STATE TO EXTRADITION HABEAS CORPUS, SUCH JEOPARDY CAN BE FOUNDED ON THE ALLEGED COLLATERAL ESTOPPEL EFFECTS OF A PRETRIAL DISMISSAL BASED ON EVIDENCE SUPPRESSION OF A DIFFERENT CHARGE BASED ON A DIFFERENT OFFENSE NOT EVEN OCCURRING ON THE SAME DAY

G. WHETHER ALLEGED DENIAL OF SPEEDY TRIAL IS REVIEWABLE IN THE ASYLUM STATE ON EXTRADITION HABEAS CORPUS

H. WHETHER PETITIONER WAS ENTITLED TO A FULL EVIDENTIARY HEARING, HAVING PLACED NO DISPUTED FACTS IN ISSUE RELEVANT TO THE QUESTION OF EXTRADITION

IV

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article IV, Section 2, of the United States Constitution provides in pertinent part as follows:

* * *

"2. A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime."

V

STATEMENT OF THE CASE[2/]

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2. Key to Abbreviations:

C.R. refers to Clerk's Record
R.T. refers to Reporter's Transcript
Petition refers to petition for certiorari
A. refers to appendix of petition for certiorari

On November 19, 1969 petitioner allegedly sold L.S.D. to undercover police officer Van Zile in Woods Cross City, Utah. (C.R. 23, 24.) Instead of charging this offense, authorities used the information to obtain a warrant to search petitioner's residence (C.R. 100-106, 80-86) (thereby avoiding disclosure of Van Zile's identity). Evidence seized November 24, 1969 formed the basis for a complaint issued that day charging petitioner with possession of narcotics for sale. (C.R. 56, 79.) However, at the January 15, 1970 preliminary hearing, all the evidence was suppressed (C.R. 55) on petitioner's motion (C.R. 60-62), resulting in dismissal of the complaint on prosecution motion (C.R. 55).

On January 26, 1970 the present complaint (embodying the affidavit of Ron Ballantyne) and arrest warrant was issued charging petitioner with the November 19, 1969 unlawful sale of L.S.D. (C.R. 24, 72, 21), a decision having apparently been made to use the testimony of Van Zile whose identity had previously been confidential (C.R. 23, 35).

Sometime after the January 15, 1970 hearing, petitioner left Utah. (C.R. 23,

55.) Utah authorities contacted the FBI on March 18, 1970 and requested their assistance in locating appellant. On March 31, it was learned that appellant was probably in the Los Angeles area. Appellant was arrested on November 30, 1972,[3] by an FBI agent in Burbank, California. At the time of his arrest appellant produced a Hawaii driver's license and a social security card bearing the name "Taylor Evan Craig." He stated that he was using that name and that the Hawaiian address on his license was

3. Although FBI Agent Farrell's original affidavit specified April 30, 1972 as the date Price was finally located and apprehended (C.R. 34), this was found to be an inadvertent error. Agent Farrell subsequently executed a correcting affidavit which was submitted to the Court of Appeals for the Ninth Circuit with a stipulation of counsel for petitioner and real party in interest that it be added to the record. This latter document gives November 30, 1972 as the date of apprehension. (See "Order Augmenting and Correcting Record" in Ninth Circuit.)

his last permanent residence. (C.R. 34-35.)[4]

On December 12, 1972 authorities filed a fugitive complaint in the Municipal Court of the Los Angeles Judicial District (C.R. 73). On January 4, 1973, pursuant to an application by the Davis County Attorney (C.R. 20-23), the Governor of Utah granted an extradition requisition. (C.R. 19.) The Governor of California issued an extradition warrant on January 17, 1973. (C.R. 31-32.) After a full hearing by California's Extradition Officer, appellant was ordered extradited. (C.R. 37.) Appellant then attempted to obtain habeas corpus relief from the California courts (petition, A1-2) and by certiorari before the United States

4. Price also stated (spontaneously):

"Those redneck, cowboy, Mormans had me dead to rights. They had evidence three feet high with pictures of LSD and fingerprints, but they really blew it. Their affidavit for a search warrant didn't have enough probable cause so everything got suppressed. They were supposed to have a confidential informant but didn't want to reveal him. I guess now they are going to. They know I'm guilty but can't prove it." (C.R. 35: 21-28.)

Supreme Court (petition, 2). His petitions were denied. (C.R. 37-38, 41-42.) (Price v. California [1973] 414 U.S. 823, 38 L.Ed.2d 56, 94 S.Ct. 123.)

The present habeas corpus petition was filed on April 13, 1973. (C.R. 1-9.) On October 29, 1973, a status hearing was held where appellant's counsel indicated that the identity of her client was the only disputed factual matter since the requisitioning documents from Utah asked for "Brian Michael Price" instead of "Mark Brian Price." Since Utah had previously attempted to prosecute appellant under his correct name, counsel argued that the incorrect name could be an attempt to camouflage the previous prosecution. (R.T. 6-8.) This issue has been abandoned on appeal.

Following review of the documents submitted in support of the contentions of the parties the district court denied appellant's petition and also his motion for reconsideration (petition, A2-10). He appealed.

On May 16, 1977 the United States Court of Appeals for the Ninth Circuit affirmed (petition, A11-18), issuing a revised opinion on July 7, 1977 (petition,

A19-26) and denying rehearing on July 11, 1977 (petition, A27).

Price now, for the second time, petitions this Court for certiorari.

VI

SUMMARY OF ARGUMENT

The instant petition fails to demonstrate that the Court of Appeals for the Ninth Circuit has, inter alia, "decided a federal question in a way in conflict with applicable decisions of this court." (Rule 19[b], Rules of the Supreme Court of the United States). In fact, the Ninth Circuit herein has rigorously followed this Court's decisions construing the extradition clause of the federal constitution (U.S. Constitution, Art 4, § 2, clause 2) so as to permit only a narrow scope of review in the asylum state, (Drew v. Thaw [1914] 235 U.S. 432, 440; 59 L.Ed. 302, 308; 35 S.Ct. 137, 139), thereby requiring petitioner to litigate his constitutional claims in the state and federal courts of the demanding state (Sweeny v. Woodall [1952] 344 U.S. 86, 89; 97 L.Ed. 114, 117-118; 73 S.Ct. 139, 140). This has been applied both to double jeopardy claims (In re Bloch, [W.D., Ark, 1898] 87 F. 981, 984; In re Collins, [1907] 151 Cal. 340, 350; Lucas v. Sheriff of

Lyon County [Nev. Supreme Court, 1970] 466 P.2d 659, 660; People ex rel Coine v. Reilly [1930] 240 N.Y.S. 27, 28-29, cf. Whitten v. Tomlinson [1895] 16 U.S. 231, 243; 40 L.Ed. 406, 412), and speedy trial claims (People v. Hoy [1961] 223 N.Y.S.2d 759, 761; Roberts v. Hocker [Nev., 1969] 456 P.2d 425, 428; Commonwealth v. Johnson [Penn., 1972] 292 A.2d 456).

Finally, this is the second petition for certiorari herein. The first came after the exhaustion of asylum-state state remedies. (See Price v. California [1973] 414 U.S. 823, 38 L.Ed.2d 56, 94 S.Ct. 123.) The only new development is the exhaustion of asylum-state federal remedies. Yet petitioner raises no issues peculiar to federal review. It follows that the certiorari should again be rejected for the same reasons it was initially rejected as the law of the case.

VII

ARGUMENT

A

THE CONSTITUTION REQUIRES PROMPT INTERSTATE RENDITION OF FUGITIVES

Lyon County [Nev. Supreme Court, 1970] 466 P.2d 659, 660; People ex rel Coine v. Reilly [1930] 240 N.Y.S. 27, 28-29, cf. Whitten v. Tomlinson [1895] 16 U.S. 231, 243; 40 L.Ed. 406, 412), and speedy trial claims (People v. Hoy [1961] 223 N.Y.S.2d 759, 761; Roberts v. Hocker [Nev., 1969] 456 P.2d 425, 428; Commonwealth v. Johnson [Penn., 1972] 292 A.2d 456).

Finally, this is the second petition for certiorari herein. The first came after the exhaustion of asylum-state state remedies. (See Price v. California [1973] 414 U.S. 823, 38 L.Ed.2d 56, 94 S.Ct. 123.) The only new development is the exhaustion of asylum-state federal remedies. Yet petitioner raises no issues peculiar to federal review. It follows that the certiorari should again be rejected for the same reasons it was initially rejected as the law of the case.

VII

ARGUMENT

A

THE CONSTITUTION REQUIRES PROMPT INTERSTATE RENDITION OF FUGITIVES

test the claimed unconstitutionality of his treatment by Alabama in the courts of that State. Respondent should be required to initiate his suit in the courts of Alabama, where all parties may be heard, where all pertinent testimony will be readily available and where suitable relief, if any is necessary, may be fashioned." (Footnotes omitted.)[5]

B

CONSTITUTIONAL DEFENSES TO THE CHARGE MUST BE ASSERTED IN THE DEMANDING STATE

Petitioner's contention that

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5. Petitioner cites "[t]he right to remove from one place to another" which he predicates on Article 4, section 2, subsection 1, of the U.S. Constitution, as a right of national citizenship protected against state action by the privileges and immunities clause of the Fourteenth Amendment (petition, p. 15). However, subsection 2 of Article 4, section 2 contains the extradition clause, obviously a limitation on the preceding subsection. Accordingly, petitioner concedes "[t]he limitation on the right of free movement [which] applies only when a citizen is a fugitive from the law " (petition, p. 16, first full paragraph).

constitutional defenses to the charge can be raised upon extradition habeas corpus is definitively answered in Johnson v. Matthews (D.C. Cir., 1950) 182 F.2d 677, 680, wherein the court after an analytical review of the history and purposes of the extradition clause to the federal constitution (Article IV, Section 2, Clause 2) was impelled to conclude:

"Of course, appellant has a right to test in a federal court the constitutional validity of his treatment by Georgia authorities. But that test cannot come as a part of the constitutional process of returning a fugitive to the state where he is charged. If this fugitive's constitutional rights are being violated in Georgia, he can and should protect them in Georgia. Not only state courts but a complete system of federal courts are there."

Thus the availability of federal relief in Utah under Fain v. Duff, (5th Cir., 1973) 488 F.2d 218 is all the more reason to reject petitioner's claim that his constitutional defenses

to the charge must be reviewed in the asylum state contrary to the constitutional mandate of the extradition clause.

As stated in Woods v. Cronvich, (5th Cir., 1968) 396 F.2d 142, 143:

"It is fundamental to our federal system that neither the courts of the asylum state, nor federal courts sitting in that state, seek to determine the constitutionality of prosecution in the state from which a fugitive has fled. It is for the courts of the charging state in the first instance to adjudicate the merits of appellant's claim. Should the appellant be denied relief in the courts of Ohio, he is entitled to raise his constitutional question in the federal courts of Ohio."

The mere fact that a different section of the federal bill of rights was involved in Woods than in the matter at bar would not seem to affect the above rationale. Nor is there any distinction here as to fugitivity as we point out elsewhere in this brief.

C

APPELLANT'S CONTENTIONS ARE OUTSIDE THE NARROW SCOPE OF EXTRADITION HABEAS CORPUS

The language of the extradition clause of the Constitution (Art. 4, § 2, cl. 2) and statutory authority thereunder (28 USC §2241(c)(3)) results in a narrow scope for extradition habeas corpus proceedings, encompassing four issues: (1) "the identity of the person," (2) "the fact that he is a fugitive from justice," (3) "the demand in due form," (4) "the indictment [i.e. criminal accusation] ... for what ... [is alleged] ... to be a crime in ... [the demanding] state, and the reasonable possibility that it may be such." (Drew v. Thaw [1914] 235 U.S. 432, 440; 59 L.Ed. 302, 308). Where these all appear, "the constitutionally required surrender is not to be interfered with by the summary process of habeas corpus upon speculations as to what ought to be the result of a trial in the place where the Constitution provides for its taking place." (Id., 235

U.S. at 440.)

1. Fugitivity

Fugitivity is indeed a relevant issue to litigate in the asylum state (Drew v. Thaw [1914] 235 U.S. 432, 59 L.Ed. 302, 35 S.Ct. 137). However, a "fugitive" is simply an accused who, having been in the demanding state when the alleged crime was committed, thereafter left that state and was found within the territory of another (any more extensive inquiry frustrating the purpose of the extradition clause) (Appleyard v. Massachusetts [1906] 203 U.S. 222, 227; 51 L.Ed. 161, 163, 27 S.Ct. 122, 123-4); Moncrief v. Anderson, [D.C. Cir., 1964] 342 F.2d 902, 904; Hogan v. O'Neill [1920] 255 U.S. 52, 56, 65 L.Ed. 500). This is a question of fact to be determined in the first instance by the Governor of the asylum state. (Moncrief, supra at 904) and release on habeas corpus is improper "unless it is made clearly and satisfactorily to appear that petitioner is not a fugitive from justice within the meaning of the Constitution and laws of the United

States" (Illinois ex rel McNichols v. Pease [1907] 207 U.S. 100, 112, 52 L.Ed. 121, 126)

Petitioner has not alleged any facts coming within the above definition of fugitivity[6/] or any of the other issues reviewable on extradition habeas corpus (See Drew, supra, 235 U.S. at 440, 59 L.Ed. at 308.)

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6. Petitioner appears to claim that he left Utah before any further charges could be filed "believing that the matter had been dismissed and finally disposed of" (petition, p. 5, third full paragraph; see also p. 6, first full paragraph [note word "immediately"]), a fact known only to him. However, since a "fugitive from justice" is not necessarily one who left the state for the very purpose of avoiding prosecution or one who left the state believing he had violated criminal laws (Black's Law Dictionary, 4th ed., p. 800 ["fugitive from justice"], citing, inter alia Hogan, supra, and Ex parte Morris [1936], 101 SW 2d 259, 261-2), it follows that petitioner need not have left Utah after the filing of the present charge nor have believed that a further charge would be filed. Nevertheless, petitioner's comment after his capture shows he was at most merely unsure that authorities would decide to reveal the informant's identity so as to charge the

(footnote 6 contd. on p. 19)

2. Sufficiency of Charge

The sufficiency of the charge for extradition purposes does not require "that there should be a good indictment, or even an indictment of any kind. It requires nothing more than a charge of crime." (Pierce v. Creecy [1908] 210 U.S. 387, 403, 52 L.Ed. 1113, 1121; 28 S.Ct. 714, 719.) It is enough that it plainly charges "the substance of a crime against the laws of [the demanding state]" (Roberts v. Reilly [1885] 116 U.S. 80, 96; 29 L.Ed. 544, 549; 6 S. Ct. 291, 300) and that the facts alleged "do not seem to be impossible in law." (Roberts, supra, 116 U.S. 96, 29 L.Ed. 549, 6 S.Ct. 300.)

(Fn. 6 contd. from p. 18)

earlier crime (sale of L.S.D.) (C.R. 35, lines 21-28), which is, of course, a separate and distinct offense. His use of an alias and Hawaiian address (C.R. 35, lines 3-8) suggests that petitioner left Utah in order to avoid further prosecution.

Contrary to petitioner (petition, p. 6, second full paragraph) the January 26, 1970 complaint (charging sale of LSD on November 19, 1969) (C.R. 24, 72) did not charge "the same offense" as the November 24, 1969 complaint (possession for sale on November 24) (C.R. 56, 79).

"There must be objections which reach deeper into the indictment than those which would be good against it in the court where it is pending" (Pierce, supra, 210 U.S. at 401-402; 52 L.Ed. at 1120; 28 S.Ct. at 718); see also Collins v. Tragger [9th Cir. 1928] 27 F.2d 842).

Obviously none of petitioner's claimed defenses are relevant to the "sufficiency of the charge" in terms of this standard.7/

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7. Petitioner erroneously claims that "there was no affidavit until more than two years after the alleged transaction" (petition, p. 21, carryover paragraph) while simultaneously admitting that the January 26, 1970 "complaint was sworn to by Ron Ballantyne" (petition, p. 13, paragraph beginning that page). Black's Law Dictionary (4th ed., 1957) defines "affidavit" as, inter alia, "... [a] statement or declaration reduced to writing, and sworn to or affirmed before some officer who has authority to administer an oath or affirmation [citation omitted] ", indicating further that "... '[affidavits]' are of two kinds; those which serve as evidence to advise the court in the decision of some preliminary issue or determination of some substantial right, and those which merely serve to invoke the judicial power. [Citation omitted.]" Defining "complaint", Black's specifies that "... [it] is often used interchangeably with 'affidavit'. [Citation omitted.]" Thus, the January 26, 1970 sworn complaint herein also constituted the affidavit of Ron Ballantyne. (See C.R. 24, 72.)

D

THE PLEA OF DOUBLE JEOPARDY, LIKE ANY PLEA, MUST BE ENTERED IN THE DEMANDING STATE AND CANNOT BE CONSIDERED PRIOR THERETO IN THE ASYLUM STATE AS A DEFENSE TO EXTRADITION

The general rule as to admissibility of defenses to the charge on habeas corpus review in the asylum state is as follows: "On habeas corpus in extradition cases, the court will not try the question of guilt or innocense, or consider or pass on any matters of defense, even on the issue of accused's status as a fugitive from justice. Insanity of accused is matter of defense within this rule, as is the statute of limitations or a plea of former jeopardy, conviction, or acquittal, or an alibi, except where the evidence of alibi is such as to disprove that accused is a fugitive from justice." (39 C.J.S. 561-562 ["Habeas Corpus" § 39] [footnotes omitted].)

As the above quotation indicates, double jeopardy, although a defense to further prosecution on the charge in the demanding state, is not a defense to extradition from the asylum state. (As to

habeas corpus before entry of plea, see Whitten v. Tomlinson [1895] 160 U.S. 231, 243; 40 L.Ed. 406, 412; 16 S.Ct. 297, 302 [an extradition case]; as to extradition, see In re Bloch [W.D., Ark., 1898] 87 F. 981, 984; In re Collins [1907] 151 Cal. 340, 350; Lucas v. Sheriff of Lyon County [Nev. Supreme Court, 1970] 466 P.2d 659, 660; People ex rel. Coine v. Reilly [1930] 240 N.Y.S. 27, 28-29.) The rejection of the prisoner's contentions that double jeopardy was in issue was essential to the upholding of extradition in each case. This is even more the case, where as here, the plea of double jeopardy has not yet been entered in the demanding state. (See Whitten v. Tomlinson [1895] 16 U.S. 231, 243; 40 L. Ed. 406, 412; 16 S.Ct. 297, 302.)

"Once in jeopardy" is generally entered as a plea to the charge (e.g., California Penal Code § 1016). By analogy, alibi evidence in support of a plea of innocence or "not guilty" is inadmissible to show that the petitioner is not a fugitive from justice (unless it also tends to show absence from the demanding state at the time the crime was committed). (39 C.J.S. 557 ["Habeas Corpus" § 39];

Ryan v. Rogers [1913] 21 Wyo. 311, 132 P. 95, 104-106.) Early as a plea may arise in the course of criminal proceeding, it is by no means the earliest stage. Between the filing of the charge and entry of the plea, a defendant may demur to the accusatory pleading on grounds of the statute of limitations, also a bar (People v. Ayhens [1890] 85 Cal. 86, 89). Nevertheless, the statute of limitations is not a defense to extradition (U.S. ex rel Tyler v. Henderson [1971] 453 F.2d 790, 793). Even the more fundamental defect that the statute defining the crime is unconstitutional is not a defense to extradition (Pearce v. Texas [1894] 155 U.S. 311, 39 L.Ed. 164, 15 S.Ct. 116; Collins v. Traeger [9th Cir. 1928] 27 F.2d 842; People ex rel Gilbert v. Babb [1953] 415 Ill. 349, 354-357, 114 N.E.2d 358, 361-363.) All of these defenses arise after and in response to the filing of the charge. However, "[e]xtradition is an even more preliminary step in a criminal proceeding than the filing of an indictment." (In re Russell [1974] 12 Cal.3d 229, 233.)

E

STATE REMEDIES HAVE NOT BEEN EXHAUSTED HEREIN--A PREREQUISITE TO FEDERAL HABEAS CORPUS

1. Must Include Remedies of Demanding State

Where an applicant for a writ of habeas corpus in behalf of a fugitive from custody pursuant to a judgment in another state seeks federal relief on grounds of prospective or actual denial of constitutional right in the demanding state, not only must the remedies of the asylum state be exhausted, but also those of the demanding state. (Sweeney v. Woodall [1952] 344 U.S. 86, 89-90; 97 L. Ed. 114, 118; 73 S.Ct. 139, 140-141.) A fortiori, this requirement would apply even more strongly herein where the demanding state has not yet been afforded an opportunity to even provide the applicant with pre-trial remedies, much less the fair trial which presumably awaits. (Cf. Malory v. McGettrick [6th Cir. 1963] 318 F.2d 816, 817.) The grounds for relief recited in the instant petition should have been addressed to the courts of Utah whose remedies have not been even sampled, much less exhausted.

Petitioner correctly states that he is entitled to be heard in the asylum state as to his fugitivity (citing, Drew v. Thaw, 235 U.S. 432, and other decisions). By definition, remedies as to fugitivity (as opposed to criminality and triability) could only be found within an asylum state (and could only be exhausted there). Nevertheless, as we show elsewhere in this brief (supra at 17), claims of double jeopardy and other constitutional defenses to the charge do not relate to fugitivity as authoritatively defined,[8] but extend beyond the narrow concerns of the asylum state as such. It follows that remedies which by their nature can be sought in the demanding state should first be sought there (even though, as to these issues, it leaves appellant at the mercy of the state and federal courts of Utah). It should be noted that the District Court applied the Sweeney requirement only to appellant's claims of prospective denial of constitutional rights in the demanding state. (C.R. 132.)

Petitioner herein wants more than review by state and federal court systems in

8. Nor do they relate to any other extradition issue. (See infra.)

the demanding state. He also insists on litigating these non-extradition issues in two additional series of courts (i.e., state and federal of the asylum state). If such eternal litigation is not to assume Dickensian proportions, appellant must be promptly returned to Utah to litigate his non-extradition issues.

2. Must Include Remedies Other Than Habeas Corpus

Even had petitioner exhausted his habeas corpus remedies in both Utah and California (not the case herein), if other state remedies remain which he could assert, his state remedies have not been exhausted. (Tyler v. Swenson [1973] 483 F.2d 611, 614.) Herein, petitioner has concededly failed to enter in Utah courts a plea of once-in-jeopardy or his motion to dismiss for lack of speedy trial under the Sixth and Fourteenth Amendments to the Federal Constitution. Failure to do so is fatal to his application for federal habeas corpus.

F

EVEN ASSUMING APPLICABILITY OF PROSPECTIVE DOUBLE JEOPARDY IN THE DEMANDING STATE TO EXTRADITION HABEAS CORPUS, SUCH JEOPARDY CANNOT BE FOUNDED ON THE ALLEGED COLLATERAL ESTOPPEL EFFECTS OF A PRETRIAL DISMISSAL BASED ON EVIDENCE SUPPRESSION OF A DIFFERENT CHARGE BASED ON A DIFFERENT OFFENSE NOT EVEN OCCURRING ON THE SAME DAY

Former Jeopardy

Under the facts alleged by appellant jeopardy never attached because the matter was dismissed before the trial stage had been reached, no jury having been duly empanelled, sworn and charged with the case, and no witness having been called or sworn to testify at the trial as to the merits. (C.T. 55, 64.) (See People v. Young [1929] 100 Cal.App. 18, 23; Collins v. Loisel [1922] 262 U.S. 426, 67 L.Ed. 1062; State v. Dean [Utah, 1927] 254 P. 142, 144, 69 Utah 268; Boyer v. Larson [Utah, 1967] 43 P.2d 1015, 1016, 20 Utah 2d 121.)

This situation resulted because all evidence relating to the merits had been suppressed and the matter was dismissed before the trial stage was reached. (C.R. 35.) (See generally 22 C.J.S. 658 ["Criminal Law" § 251].)

In addition, whatever jeopardy might have accrued in the matter previously dismissed (C.R. 56, 79) would not be a bar to prosecution of the present offense (C.R. 23, 24, 72, 84, 164) which is neither the "same offense" (see, United States Constitution, Fifth Amendment) nor another offense based upon or included in the act previously charged, but a separate and distinct crime. (C.T. 77, 84.) (See People v. Brannon [1924] 70 Cal. App. 225, 235; Pereira v. United States [1953] 347 U.S. 1, 11; 98 L.Ed. 435, 445; 74 S.Ct. 358, 364; United States v. Ewell, Ind. [1966] 383 U.S. 116, 124-125; 15 L.Ed.2d 627, 633; 86 S.Ct. 773, 778-779; see generally 22 C.J.S. 719 ["Criminal Law" § 278(1)], 22 C.J.S. 722 ["Criminal Law" § 279].)

Res Judicata and Collateral Estoppel

Under the facts alleged by appellant neither the doctrines of res

judicata or collateral estoppel apply because there was no final determination on the merits but merely a pretrial dismissal based on evidence suppression. (See People v. Van Eyk [1961] 56 Cal.2d 471, 477; People v. Dugan [1964] 230 Cal.App.2d 254, 256; see generally 50 C.J.S. 53 ["Judgments" § 627] 50 C.J.S. 73 ["Judgments" § 639]; Gardner v. United States [9th Cir.; Cal.; 1934] 71 F.2d 63, 64, cert. den. 293 U.S. 619, 79 L.Ed. 707; Orient Ins. Co. v. Ariasi [9th Cir., 1928] 28 F.2d 579, 581, cert. den. Ariasi v. Orient Ins. Co., 279 U.S. 837, 73 L.Ed. 984.)

Defenses Not Properly Raised

By failing to set up the special plea of once in jeopardy appellant waives his right to assert it (In re Harron [1923] 191 Cal. 457, 467; State v. Bohn [Utah, 1926] 248 P. 119, 121, 67 Utah 362; see generally 22 C.J.S. 711 ["Criminal Law" § 277].) Similarly, the defenses of res judicata and collateral estoppel should be raised by pleading as an affirmative defense or by proper and timely objection to the

introduction of the evidence (People v. Beltran [1949] 94 Cal.App.2d 197, 207 [defense considered, under circumstances, but manner presented disapproved]; see generally 50 C.J.S. ["Judgments" § 822].) All of this tends to show that consideration of these defenses on extradition habeas corpus before even a plea is entered or evidence is attempted to be introduced is necessarily premature and unripe.

G

ALLEGED DENIAL OF SPEEDY TRIAL
IS NOT REVIEWABLE IN THE
ASYLUM STATE ON EXTRADITION
HABEAS CORPUS

Like other defenses, the allegations that the demanding state has deprived petitioner of his constitutional and statutory rights to a speedy trial cannot be reviewed in a habeas corpus proceeding challenging the validity of the extradition process. (People v. Hoy [N.Y., 1961] 223 N.Y.S. 2d 759, 761; Roberts v. Hocker [Nev. 1969] 456 P.2d 425, 428; Commonwealth ex rel Johnson v. Johnson [Penn.,1972] 292 A. 2d 456). A state's right to the return of a fugitive is not waived, where, though having knowledge of the prisoner's whereabouts, such state has not without unreasonable delay initiated extradition proceedings (In re McBride [1953] 115 Cal. App.2d 538, 543; cf. Maryland v. Kurek [1964] 233 F. Supp. 431, 433 [pre-trial federal removal not compelled where state remedies not yet exhausted]).9/

9. Petitioner cites Moore v. Arizona [1973] 414 U.S. 25, 38 L.Ed.2d 183, 94 S. Ct. 188 (petition, 22). However, unlike

[fn. continued on p.]

Because of the imprecision of the right to a speedy trial, the length of the delay in bringing a defendant to trial that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of each case (Barker v. Wingo [1972] 407 U.S. 514, 530; 33 L.Ed.2d 101, 117; 92 A S.Ct. 2182, 2192). A balancing test must be employed wherein the conduct of both the prosecution and the defendant are weighed (id., 407 U.S. at 530, 33 L.Ed.2d at 116; 92A S.Ct. at 2191-2192). Factors include (1) length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) prejudice to the defendant (id., 407 U.S. at 530, 33 L.Ed.2d at 117). Different weights should be assigned to different reasons for delay of the case by the government (id., 407 U.S. at 531; 33 L.Ed.2d at 117; 92A S.Ct. at 2192-2193). Of course, if delay is attributable to the defendant, then his waiver may be

[fn. 9 continued]

the instant case, Moore did not involve an attempt to review the speedy trial issue on extradition habeas corpus in the state and federal courts of the asylum state.

given effect under standard waiver doctrine. (Id., 407 U.S. at 533, 33 L.Ed.2d at 116, 92A S.Ct. at 2191.)

Because of the difficulty of balancing these factors (Barker, supra, 407 U.S. at 533, 33 L.Ed.2d at 117, 92A S.Ct. at 2193) it makes sense that the only logical place for consideration of such a claim at the onset is the demanding state wherein most of the witnesses, evidence, and records relevant to the claim would be situated.

Using the Barker test, it appears that the greater part of the delay seems to be attributable to petitioner himself, hiding out in Hawaii under an assumed name with phony credentials. The steps undertaken locally by Utah authorities before contacting the FBI on March 18, 1970 and after learning of petitioner's November 30, 1972[10/] apprehension on federal charges should obviously be reviewed at the outset in the courts of the state of Utah who are best equipped to weigh the various factors.

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10. See footnote 3, supra.

H

PETITIONER WAS NOT ENTITLED TO A FULL EVIDENTIARY HEARING, HAVING PLACED NO DISPUTED FACTS IN ISSUE RELEVANT TO THE QUESTION OF EXTRADITION

Petitioner contends that he is "entitled to a full evidentiary hearing" in the asylum state "on the issue of probable cause to issue an extradition warrant based on the facts of this case." (Petition, 8, first full paragraph; 12, third full paragraph). Yet his petition apparently does not refer to any issue of fact that should have been thus explored.

Appellant admits that he was given an executive hearing on February 9, 1973 before the California Governor's Extradition Officer at which he was represented by his present counsel and wherein "all issues raised" in his original petition for habeas corpus, "including the issue of identity and whether the petitioner was and is a fugitive from justice were raised." (C.R. 37: 17-26.)

At the governor's hearing evidence independent of the requisition papers is not required (Marbles v. Creecy [1909] 215 U.S. 63, 67-68; 54 L.Ed. 92, 94; 30

S.Ct. 32, 33). Thus the function of a court, reviewing the governor's decision, is to determine whether, as a matter of law, it could have been reached on the basis of the evidence before him, not to weigh the evidence de novo (Ex Parte Reggel [1885] 114 U.S. 642, 653; 29 L.Ed. 250, 254; 5 S.Ct. 1148, 1154). If the jurisdictional facts authorizing the extradition of the accused appear from the papers, the mere "evidence pro and con" as to a question of fact before the governor would not justify discharge on habeas corpus. (Hyatt v. New York ex rel Corkran [1902] 188 U.S. 691, 710-711; 47 L.Ed. 657, 661; 23 S.Ct. 456, 458-459; Commonwealth ex rel Flower v. Superintendent of Phila. County Prison [Penn. 1908] 69 A. 916, 917; Moncrief v. Anderson [D.C. Cir., 1964] 342 F.2d 902, 904.) Thus, no evidentiary hearing is required where the allegations even if proven "would present only a conflict in the evidence" (Smith v. State of Idaho [9th Cir., 1967] 373 F.2d 149, 156).

In the district court, petitioner pointed out that the name on the fugitive complaint filed in Los Angeles Municipal Court on December 13, 1972, was "Brian Michael Price" (R.T. 5, lines 19-23; C.R.

73). Yet the Utah requisition (C.R. 19) and both Utah complaints (C.R. 24, 79) refer to Mark Brian Price (or Mark Price). Furthermore, petitioner also implicitly admitted identity in order to claim double jeopardy (R.T. 5, lines 24-25) and upon capture had volunteered that he was the person sought in both complaints (C.R. 35). The mistaken identity claim was abandoned on appeal (petition, A21, first full paragraph) and appears not to be presented by the instant petition.

CONCLUSION

For the reasons stated above, the Petition should be denied.

Respectfully submitted,

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By

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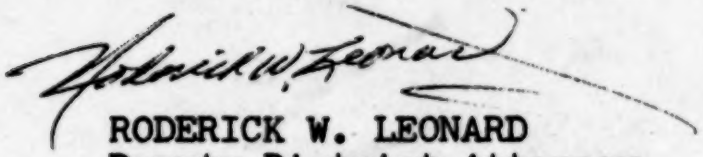

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